UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AIRGAS USA, LLC

Case 09-CA-152301

and

STEVEN WAYNE ROTTINGHOUSE, JR.

RESPONDENT'S MOTION FOR RECONSIDERATION OF NLRB ORDER GRANTING COUNSEL FOR THE GENERAL COUNSEL'S MOTION TO WITHDRAW MOTION FOR DEFAULT JUDGMENT AND REMANDING CASE TO REGIONAL DIRECTOR OF REGION 9

Summary

The National Labor Relations Board should grant this Motion for Reconsideration to protect the Respondent from prejudice and to avert undue delay in the resolution of a live legal controversy.

The Respondent, Airgas USA, LLC, entered into a settlement agreement on August 27, 2015 to resolve case 09-CA152301. Airgas posted the remedial notice for 60 consecutive days and refrained from communicating in a manner that detracted from the notice; after full performance by Airgas, Region 9 of the NLRB attempted to unilaterally impose a new term on Airgas, which Airgas never agreed to. Three years later, on October 3, 2018, Counsel for the General Counsel ("Region 9") filed a motion for default, and two days later, on October 5, 2018, the National Labor Relations Board issued a Notice to Show Cause. Airgas filed its Response on

October 19, 2018. On October 25, 2018, without explanation, Region 9 filed a Motion to Withdraw Motion for Default Judgement ("Motion to Withdraw"). Airgas filed its Opposition to Regions 9's Motion to Withdraw on October 29, 2018. Earlier in the day of October 29, 2018, however, the Office of the NLRB Executive Secretary issued a letter that granted Region 9's Motion to Withdraw and remanded the case to the Regional Director for Regions 9 ("Order").

Airgas urges the NLRB to reconsider its Order. Reconsideration is appropriate because the Board's Order was interlocutory in nature and no final judgement has been rendered in this case. Reconsideration is justified because the NLRB was not able to consider Respondent's Opposition to the Motion to Withdraw nor the compelling public policy interests prompting Respondent's Opposition. Reconsideration is impelled by the existence of a live legal controversy that the Board may resolve now and by the prejudice the Respondent must otherwise endure.

Argument

I. Prior to Issuance of Final Judgment, a Tribunal is Free to Reconsider an Interlocutory Ruling it Previously Rendered.

Motions to Reconsider final judgements raise concerns that are not implicated by Motions to Reconsider interlocutory rulings. For instance, Motions to Reconsider final judgements implicate issues of finality, ripeness for appeal and jurisdictional overlap.[1] On the other hand, because Motions to Reconsider

[1] *See, e.g., Griggs v. Provident Consumer Discount Co*., 459 U.S. 56, 58-59 (1982) (noting the dangers of dual assertions of jurisdiction); 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction

interlocutory rulings do not raise the same issues of finality and jurisdiction, a tribunal is not constrained by these concerns and may freely reexamine its own prior rulings.[2]

II. Reconsideration of an Interlocutory Ruling is Justified Where the Tribunal Has Not Thoroughly Considered the Issues Underlying the Ruling that is Challenged by the Motion to Reconsider.

Neither the NLRB's Regulations nor the Federal Rules of Civil Procedure limit a tribunal to a particular standard when that tribunal reviews one of its own earlier rulings.[3] One district court has suggested restricting review of a motion to reconsider a prior ruling "in proportion to how thoroughly the earlier ruling addressed the specific findings or conclusions that the motion to reconsider challenges."[4]

Even under this restrictive view, the facts of this case compel review. For example, the Board's Order issued before Respondent filed its Opposition despite the fact that Respondent filed its Opposition within three business days after Region 9 filed its Motion to Withdraw. Moreover, although the NLRB's Regulations require that motions "must briefly state the order or relief applied for and the ground therefor," Region 9 did not state its grounds for requesting relief.[5] The

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of appeals from all final decisions of the district courts . . ."); Fed.R.Civ.P. 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies."); Fed.R.Civ.P. 60 (detailing time limits for when district court may consider motion and when a Court of Appeals' jurisdiction trumps district court's); Fed. R. App. P. 4 (a)(4)(B) (when district court's jurisdiction trumps that of the Court of Appeals).

[2] *See, e.g.*, Fed.R.Civ.P. 54(b) (". . . may be revised at any time before the entry of a judgment. . ."); *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995) (judge is free to examine earlier ruling).

[3] Fed.R.Civ.P. 54(a), 59(e), 60(b); 29 CFR §102.24.

[4] *United States v. Loera*, 182 F.Supp.3d 1173 at 1206 (D.N.M. April 19, 2016).

[5] 29 CFR §102.24(a).

general purpose for requiring a moving party to provide the grounds for relief is to "provide notice to the court and the opposing party."[6] By filing its motion without providing this notice, Region 9 has prejudiced the Respondent and deprived the Board of the ability to properly consider the issues at stake in its Order.[7]

III. If Allowed to Stand, the Board's Interlocutory Order Will Prejudice the Respondent Because Region 9 Continues to Allege Respondent Has Breached the Settlement Agreement.

On October 3, 2018, Region 9 filed a motion for default judgment in case 09-CA-152301 ostensibly as a result of allegations from a "completely separate" case.[8] On the same day, Region 9 issued a "Complaint Based on Breach of Affirmative Provision of Settlement Agreement" in the same case. Region 9 has now been permitted to withdraw one but not the other.[9] This outcome, if allowed to stand by the Board, exposes the Respondent to double-jeopardy and indefinitely deprives Respondent of due process since Region 9 could—at least according to Region 9's apparent reading of the default language—refile a motion for Default Judgment against Airgas at any time in the future without regard for the statutory limitation contained in Section 10(b) of the Act.

The default language requires Region 9 to pursue an alleged breach through a Motion for Default Judgement, but by withdrawing its previously filed Motion and not withdrawing its concurrently issued Complaint, Region 9 has not only

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[6] *See Elustra v. Mineo*, 595 F.3d 699 (7th Cir. 2010) (and cases cited therein).
[7] Id.
[8] The allegations considered in and ultimate disposition of a completely separate case "are not relevant to" the determination of settlement agreement compliance in another case. *Long Mechanical, Inc*., 358 NLRB No. 98 fn 4 (2012).
[9] Region 9 did not attempt to determine Respondent's position on this Motion prior to filing.

prejudiced the Respondent but also created significant confusion for all employers. Region 9 has continued to refrain from communicating to either the Respondent or to the Board whether by withdrawing its Motion for Default Judgment it intends to further prosecute this matter. As a result, employers under the jurisdiction of the Board are now unable to determine three things: (1) whether informal settlement agreements that contain default language ever expire even after full performance or after being supplanted by a subsequent settlement agreement, (2) whether an alleged unfair labor practice charge in a completely separate case constitutes a breach of such a settlement agreement, and (3) whether the default language requires an NLRB Region to pursue resolution of an alleged breach through a motion for default judgment.

IV. Review is Compelled by the Public Policy Interest Favoring the Prompt Legal Resolution of Live Legal Controversies.

Granting a Motion for Default Judgment is proper when there is no dispute as to default.[10] In this case, however, there is a dispute as to default. The Respondent does not believe it is in default,[11] and Region 9 disagrees. Region 9, by not stating its grounds for seeking relief, was able to avoid "thorough consideration" and obtain relief despite the fact that the parties dispute whether a breach of the

[10] *See e.g.*, *Green v. Bauer*, 2008 WL 4155673 (S.D. Ohio, Sept. 9, 2008) (plaintiff's Unopposed Motion to Withdraw Motion for Default Judgment granted based on finding that "Defendants, having appeared and timely filed an Answer, are not in default."); S*tate Farm Fire and Casualty Insurance Company v. Lowe's Companies, Inc*., 2016 WL 8609568 (E.D. North Carolina, Feb., 25, 2016) (granting Unopposed Motion to Withdraw Default Judgment after opposing party presented meritorious defense and moving party moved to withdraw); *U.S. v. Distribuidora Batz CGH, S.A. De C.V.*, 2009 WL 2487971 (S.D. California, Aug. 10, 2009) (granting Motion to Withdraw Motion for Default Judgment where motion was unopposed and only after relevant defendants filed motions opposing default judgment motion and moved to set aside clerk's entry of default).

[11] Indeed, the Employer does not believe there is anything to be in default of.

settlement agreement has occurred. Making this case even more suitable for review is the fact this this dispute regarding breach goes well beyond a mere procedural disagreement.

The actual dispute or controversy[12] concerns whether Airgas effectively settled the unfair labor practice charge underlying case 09-CA-152301 by posting the remedial notice for the required 60 days, as Airgas contends, or whether inclusion of unmodified default language extended the duration of an informal settlement agreement's term to "forever" regardless of full performance or of any subsequent informal settlement agreements that might have supplanted the first, as Region 9 contends. This live legal issue must be decided either now, as a result of the Board granting this Motion for Reconsideration, or later, after Region 9 prosecutes its Complaint or files another Motion for Default Judgment. Because public policy strongly favors judicial economy, the Respondent urges the Board to grant this Motion for Reconsideration so it can more thoroughly consider the underlying issues in this case.

[12] Putting aside the "length of term" issue, the actual controversy here also concerns whether an allegation from a "completely separate" case constitutes a breach of an informal settlement agreement in the case under consideration.

Conclusion

Because of Region 9's failure to state the grounds upon which it sought relief in its Motion to Withdraw, the NLRB was never prompted to thoroughly examine the issues at stake in issuing what otherwise may have appeared as a routine procedural Order. The Respondent now urges reconsideration of these previously unexamined issues in order to prevent the confusion, prejudice and judicial delay that would otherwise result.

Therefore, for any one of several reasons, the National Labor Relations Board should grant Respondent's Motion for Reconsideration.

Respectfully submitted this 4th day of November, 2018

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CERTIFICATE OF SERVICE

I certify that a copy of Respondent's Motion for Reconsideration was electronically served on all parties in the manner listed below:

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DATED this 4th day of November, 2018

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